

**BEFORE THE WORKERS COMPENSATION APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RICARDO P. RAMIREZ**

Claimant

V.

**CARGILL MEAT SOLUTIONS CORP.**

Respondent

AND

**INSURANCE COMPANY OF**

**STATE OF PENNSYLVANIA**

Insurance Carrier

Docket No. 1,066,385

**ORDER**

Claimant requests review of Administrative Law Judge Pamela J. Fuller's May 7, 2014 preliminary hearing Order. Mitchell W. Rice of Hutchinson appeared for claimant and D. Shane Bangerter of Dodge City appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the May 7, 2014 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

**ISSUES**

The judge concluded claimant voluntarily participated in a fight and denied claimant's request for benefits under K.S.A. 2013 Supp. 44-501(a)(1)(E).

Claimant requests the Order be reversed, arguing he did not voluntarily participate in the fight, but was simply defending himself. Claimant also asserts that his injury was the result of falling and not from the fight. Respondent maintains the Order should be affirmed.

The issue for the Board's review is: Should claimant be denied benefits pursuant to K.S.A. 2013 Supp. 44-501(a)(1)(E)?

**FINDINGS OF FACT**

Claimant worked for respondent for 11 years. On June 5, 2013, claimant was involved in an altercation with a coworker named Guerrero Contreras Simental (Guerrero). Claimant alleges injuries primarily involving his right elbow.

Following the incident, claimant and Guerrero were suspended, pending an investigation in which respondent's human resources representative, Lauren Woodworth, took statements from several employees. Emails from Ms. Woodworth containing summaries of employee statements taken on June 6 and June 8, 2013, were placed into evidence over claimant's hearsay objection.

Jose Rodriguez told Ms. Woodworth claimant was looking for problems. He did not see the fight start. He stated claimant had left his work area and he and Guerrero were fighting. He did not see claimant hit Guerrero, but saw Guerrero hit claimant.

Liuver Moran told Ms. Woodworth claimant and Guerrero had been arguing for about a month prior to the incident. When claimant dropped a piece of meat, he would try to throw it to the sink, but it occasionally struck Guerrero. Mr. Moran said claimant had been causing everyone problems. Before the fight, claimant tried to throw a piece of meat into a sink, but it hit Mr. Moran, causing him to nearly drop a bunch of knives. At the time of the incident, they were short-handed with only four workers. Mr. Moran stated claimant got mad because Guerrero let a piece go.<sup>1</sup> Thereafter, according to Mr. Moran, claimant and Guerrero started arguing, Guerrero punched claimant in the face and claimant punched Guerrero on the nose. Guerrero pushed claimant to the floor and was on top of him, hitting him on the face, not giving claimant a chance to fight back. Claimant and Guerrero were separated and someone told Guerrero to calm down.

While he was unsure of their names, Jaime Estevane told Ms. Woodworth he saw claimant on the floor and Guerrero on top of claimant, punching him. Mr. Estevane pulled Guerrero off claimant and told him to relax. Mr. Estevane told Ms. Woodworth that Guerrero said claimant pushed him first.

Alejandro Niave told Ms. Woodworth that employees were yelling because two workers were fighting. He went over to where the altercation was occurring and saw claimant on the ground and Guerrero standing over claimant, punching him. He confirmed Mr. Estevane pulled Guerrero off claimant. Mr. Niave explained that Guerrero said he took his knife out of a yellow tub really fast, which resulted in claimant asking him what he was doing. Guerrero said whatever and claimant pushed him.

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<sup>1</sup> This Board Member is not sure from the record whether this means Guerrero let a piece of meat go by him on a conveyor belt.

Binito Nguyen told Ms. Woodworth by the time he arrived, claimant and Guerrero had been separated. Claimant had a bloody nose and Guerrero had a cut on the bridge of his nose. When asked what the altercation concerned, Mr. Nguyen stated:

I don't know. According to Ricardo, Guerrero let his piece go by so Guerrero tried to get his piece and bumped Ricardo out of the way. So Ricardo asked what was going on and they started fighting. According to Guerrero, Guerrero tried to get his knife from the sharp knife bucket and Ricardo tried to push him.<sup>2</sup>

Guerrero told Ms. Woodworth that he was getting a knife from a yellow tub. The area in which they were working was small. Apparently when claimant was trying to walk by Guerrero, they bumped into each other. Claimant asked Guerrero why he had pushed him and asked Guerrero if he wanted to fight. Guerrero then hit claimant. After the encounter, Guerrero had an abrasion to his nose. Guerrero told Ms. Woodworth that he and claimant had issues before and were not on speaking terms.

Guerrero completed a written statement in Spanish that was translated to English. It states:

I was picking up the knives/getting the knives and he (Ricardo) told me what's going on. I told him what do you want? And that's where the fight started. I always saw a bad attitude. He wanted to hit Polo and the Cuban. I simply defended myself because he threw a punch. I have also seen that he has bad intentions with women whenever they walk by.<sup>3</sup>

Claimant told Ms. Woodworth that he was working at the skirt puller and Guerrero pushed him. Claimant asked Guerrero why he pushed him. Guerrero pushed him and then punched him in the face and nose. Claimant fell down. Claimant reported injuries to his upper lip, right eye, nose and left cheek.

Claimant gave a written statement in Spanish that was translated to English. It states:

The gentleman walked through my area and when he walked back, he pushed me. Then I asked him why he pushed me and he told me because he wanted to. Then he came towards me and then he hit me. Then I slipped and he wanted to keep on hitting me. I pushed him with my foot so he would stop hitting me.<sup>4</sup>

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<sup>2</sup> P.H. Trans., Resp. Ex. 1 at 7.

<sup>3</sup> *Id.*, Resp. Ex. 1 at 9.

<sup>4</sup> *Id.*, Resp. Ex. 1 at 9.

Respondent terminated the employment of claimant and Guerrero on June 10, 2013, based on "violence in the workplace."<sup>5</sup> Claimant filed a union grievance, but has not been reinstated.

Claimant was examined at Cargill Meat Solutions Health Service on July 11, 2013. In addition to reporting facial injuries, claimant reported hurting his right elbow from falling down after being hit during the fight, which he stated he did not previously report because he did not have any elbow pain. Claimant also complained of right neck pain or tightness. Terry R. Hunsberger, D.O., indicated claimant's facial injuries had returned to normal and claimant was at maximum medical improvement without need for restrictions and without any limitations or disabilities.

On January 9, 2014, claimant was seen at his attorney's request by C. Reiff Brown, M.D. Claimant relayed that a coworker had pushed him and then punched him. Claimant complained of constant right elbow pain which increases with movement of the arm and even goes into the shoulder and upper thoracic region. Dr. Brown did not think claimant was suffering acute pain, but noted he was carrying his right arm at his side. Dr. Brown recommended evaluation by an orthopedic surgeon specializing in upper extremity injuries. Dr. Brown concluded claimant was temporarily totally disabled until seen by a qualified orthopedist.

At the preliminary hearing, claimant testified:

What happened was that there was 20 minutes remaining for me to work, during that hour the person that goes in passes out the knives so he can get them sharpened so we can start work the next day when this person that attacked me he - - when he turned them in - - when he received his knives he went over to my area and pushed me. I was walking. When I finished doing my piece I went and got close and I asked him, Why did you push me? This person responded with bad words and said, Because I felt like so. I was going to go back because there was not an argument, he just attacked me, he just came on me. I didn't know what to do because I had the knife in my hand I was afraid of cutting him. So I put the left hand, you know, in front of my face with the knife down here trying to put it into its sleeve. (Indicating) I was not able to. I was not able to find out I don't know what happened if I actually put it in the sleeve or it fell to the floor. Because I was blocking the hits that he was throwing to me to my face.

I slipped, I fell and this person wanted to hit me when I was down on the floor. That's when I put my foot in. I don't know if I kicked him or got him off me with my foot or if somebody else was there.<sup>6</sup>

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<sup>5</sup> *Id.*, Resp. Ex. 1 at 1-2.

<sup>6</sup> *Id.* at 4-5.

At the preliminary hearing, claimant testified he fell and hurt his right elbow when he slipped on a piece of fat on the floor. He denied his elbow injury was the result of the altercation. He denied: (1) having any prior arguments with Guerrero; (2) throwing pieces of meat that would sometimes hit Guerrero; (3) throwing a piece of meat that hit Moran; (4) causing problems; or (5) throwing a punch or hitting Guerrero back. Claimant testified he was just defending himself by blocking Guerrero's punches.

The judge's May 7, 2014 Order states, in part:

After review of K.S.A. 44-501(a)(1)(E) and the evidence presented, it is found that the claimant voluntarily participated in the fight and is not entitled any compensation for injuries sustained. The claimant's request for temporary total disability and authorized medical treatment should be and the same is hereby denied.

Claimant appealed, but filed no brief.

#### **PRINCIPLES OF LAW**

K.S.A. 2013 Supp. 44-501(a)(1)(E) states:

Compensation for an injury shall be disallowed if such injury to the employee results from the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

#### **ANALYSIS**

Based on the preliminary hearing record, sufficient evidence shows claimant's injury resulted from his voluntarily participating in fighting. K.S.A. 2013 Supp. 44-501(a)(1)(E) disallows compensation.

#### **CONCLUSION**

**WHEREFORE**, the undersigned Board Member affirms the May 7, 2014 Order.<sup>7</sup>

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2014.

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<sup>7</sup> By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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HONORABLE JOHN F. CARPINELLI  
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Honorable Pamela J. Fuller